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IN THE
Supreme Court of the United States
October Term 2006

U.S. Bank National Association,

Petitioner,

v.

Kathy Kroske,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE CALIFORNIA BANKERS ASSOCIATION AND THE WASHINGTON BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, contrary to the Sixth Circuit and the California Supreme Court, that the National Bank Act's grant to national banks of the power to dismiss their officers "at pleasure," 12 U.S.C. § 24 (Fifth), fails to preempt a state employment discrimination law because a federal employment discrimination law enacted by Congress subsequent to the National Bank Act somehow makes state law applicable as well.

2. Whether the Ninth Circuit erred in holding, contrary to the Second and Sixth Circuits and this Court's precedents, that a presumption against preemption permits state laws to apply to national banks despite the longstanding preemptive force of the National Bank Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the California Bankers Association ("CBA") and the Washington Bankers Association ("WBA"), are nonprofit professional associations established more than a century ago. Each represents most of the depository financial institutions in the State of California and the State of Washington, respectively.

A significant portion of these banks are national banks organized pursuant to the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq*. These member national banks range in size from large employers such as Bank of America, National Association and Wells Fargo Bank, N.A., each operating within and outside the Ninth Circuit, to far smaller national banks, such as Chino Commercial Bank, N.A., Coast National Bank, and Inland Community Bank N.A., each operating primarily within state borders.

Regardless of their size, as employers, the member national banks rely on the NBA's specific provision that permits national banks to dismiss officers "at pleasure." 12 U.S.C. § 24(Fifth). The Ninth Circuit's decision that the NBA's at-pleasure provision may be limited by state statutes is at odds with opinions of several other federal and state courts from other jurisdictions—including state courts within the Ninth Circuit itself—regarding the

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[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

scope of preemption. The result is that national banks have no definitive guidance as to what state laws, if any, apply to them and when. *Amici* therefore have a strong interest in the resolution of the preemption question raised by Petitioner.

SUMMARY OF ARGUMENT

Over a century ago, this Court recognized that the NBA sprang out of Congress's imperative to create a national banking system "with uniform operation" governed exclusively by federal law, free from state interference. *Talbott v. Bd. of Com'rs of Silver Bow County*, 139 U.S. 438 (1891). But now, national banks have no clear, much less definitive guidance as to what employment laws apply to them and when. The Ninth Circuit stands in direct conflict with the Fourth and Sixth Circuits on the question of whether state employment discrimination statutes are preempted by the NBA and similar federal bank acts. The Ninth Circuit ruling also further muddles confusion among the lower courts as to the scope of preemption when state employment laws are inconsistent with comparable federal laws.

Consequently, depending upon where a suit is filed, a national bank can be *always* subject to state law, *never* subject to it, or *sometimes* subject to it and *sometimes not*. And when the national bank is subject to state law, it may be subject to some provisions and not others. The answer in some states—like California—depends on whether the case is brought in the state courthouse or in the federal courthouse across the street. Where Congress wanted harmony, the lower courts have yielded cacophony. For this reason alone, *certiorari* should be granted to clarify once and for all what employment laws

apply to the banks organized under federal law, and how.

Resolution of these conflicts is of fundamental importance to the national banks. The 50 states, the District of Columbia, and federal territories all have enacted their own employment discrimination statutes, many with standards different from federal law and from each other. Subjecting national banks to these competing standards would undermine Congress's goal of ensuring national banks a uniform, federal standard and insulating them from state intrusion. Thus, in the hopes of restoring the uniform federal regulation that Congress intended—or at least providing national banks with certainty on what laws control—*amici* urge this Court to grant certiorari.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED ABOUT WHETHER AND HOW MUCH THE NATIONAL BANK ACT PREEMPTS STATE LAW.

This Court long ago recognized that the NBA sprang from Congress's imperative to create a national banking system "with uniform operation"—under federal law—free from a dizzying and potentially disruptive maze of state and local regulation. *Talbott v. Bd. of Com'rs of Silver Bow County*, 139 U.S. 438 (1891). Because national banks served such an important role in protecting the national economy and promoting a national currency—especially during the Civil War era, when the relevant provisions of the NBA were passed—Congress

made it a point to erect a wall insulating the national banks from hostile states bent on destroying them and ensuring that federal law alone would govern their most important functions. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003).

One of the protections Congress adopted to protect national banks from hostile state regulators, and subject them to a uniform regime of federal regulation, was the rule giving national banks complete discretion in dismissing officers free from intrusive state regulation. Congress authorized national banks "to appoint a president, vice president, cashier, and other officers, define their duties, . . . [and] dismiss such officers or any of them at pleasure, and appoint others to fill their places." 12 U.S.C. § 24(Fifth). Congress chose the same "at pleasure" dismissal language to achieve the same goals in the Federal Reserve Act ("FRA") and Federal Home Loan Bank Act ("FHLBA"), 12 U.S.C. § 341(Fifth) and 12 U.S.C. § 1432(a), which has led the courts to interpret these provisions coextensively, *see, e.g.*, *Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 394 (6th Cir. 2004); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983), *cert. denied* 464 U.S. 1040 (1984).

To be sure, this at-pleasure provision—reposing in federal banks complete discretion in decisions about which employees were not fit to keep their jobs—served goals beyond uniformity and insulation from hostile states. Congress considered it important to grant federal banks the unfettered discretion to terminate officers at will "whenever the suspicion of faithlessness or negligence attaches to them" without fear of potential suit. *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). Without that latitude, Congress feared, the

public's trust in federal banks would wane, and citizens would favor local, community banks over national banks. While Congress has since limited this discretion with the enactment of federal employment discrimination laws like Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, it has never wavered from the imperative of ensuring uniform dismissal standards under federal law for all national banks.

The lower courts have demolished any semblance of uniform federal standards. The courts of appeals are irreconcilably split over the most fundamental question of whether state employment discrimination laws can be directed against national banks at all. The lower courts are also confused about the scope of preemption where state law employment discrimination claims are inconsistent with federal standards. The result is contrary to Congress's intent in regards to national banks. National banks are distinct from other national employers because Congress has mandated that distinction by providing for a uniform regulatory system regarding the dismissal of officers. The chaos created by the current state of the law, however, now puts national banks in a worse position than other national employers, not knowing whether the patchwork of state and federal regulations will apply to their employees. This eviscerates the uniform system of exclusively federal regulation that Congress envisioned.

A. The Circuits Are Hopelessly Split As to Whether State Employment Discrimination Laws Are Entirely Preempted.

The split among the courts of appeals is direct and

irreconcilable. The result is not just differing preemption rules from one jurisdiction to the next, but, in some states, differing rules depending upon whether the case is litigated in state or federal court.

1. The Ninth Circuit's opinion is in direct conflict with opinions of the Fourth and Sixth Circuits.

A national bank facing a state law discrimination claim like Ms. Kroske's will receive diametrically opposite rulings depending upon where it is sued.

If the officer files the claim in a federal court within the Fourth or Sixth Circuit, or in a California state court, the claim will be dismissed. These courts have held that state employment discrimination laws purporting to regulate national banks necessarily conflict with congressional intent and are thus completely preempted. *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928, 931 (6th Cir. 1987) (holding that Michigan's employment discrimination statute was preempted by the FRA); *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004) (affirming dismissal of Kentucky employment law claims because at pleasure provision of the FRA "applies to preempt state employment rights"); *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (applying Sixth Circuit precedent in the analogous context of a wrongful termination dispute); *Peatros v. Bank of America NT&SA*, 990 P.2d 539, 559, 563 (Cal. 2000) (plurality holding that state statute entirely preempted by the NBA). As the Fourth Circuit put it: "Congress intended for federal law to define the discretion which the Bank may exercise in the discharge of employees. *Any* state claim for wrongful termination would plainly conflict

with the discretion afforded by Congress." *Andrews*, 998 F.2d at 220 (emphasis added).

If, however, the officer brings the claim in a federal court within the Ninth Circuit, or in certain other states, the claim will survive. The Ninth Circuit, joining other courts, has now held that the federal banking laws do not preempt state employment discrimination laws with regulatory and remedial schemes that are completely different from federal discrimination laws so long as they are substantively comparable to federal employment laws. *See, e.g.*, *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 496 (Ohio Ct. App. 1995) (the dismissal-at-pleasure provision only creates an at-will employment agreement; since states may carve out exceptions to at-will employment, the FRA does not preempt state-created exceptions); *Moodie v. Fed. Reserve Bank of New York*, 831 F. Supp. 333, 337 (S.D.N.Y. 1993) (the at-pleasure provision of FRA does not mean that "Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation"); *Moodie v. Fed. Reserve Bank of New York*, 835 F. Supp. 751 (S.D.N.Y. 1993); *see also James v. Fed. Reserve Bank of New York*, No. 01-CV-1106(RJD)(VVP), 2005 WL 1889859, *7 (E.D.N.Y Aug. 8, 2005); *Katsiavelos v. Fed. Reserve Bank of Chicago*, No. 93 C 7724, 1995 WL 103308 (N.D. Ill. Mar. 3, 1995).

There is no way to reconcile these two lines of authority. No amount of percolation in the lower courts will resolve the conflict. The split will remain, and likely deepen, until this Court intervenes to resolve the conflict.

2. Outcomes can depend on whether a case is litigated in state or federal court.

To make matters worse, the same national bank can see different outcomes in the same discrimination claims based solely upon whether the claim is litigated in the state court or in a federal court next door.

If a bank officer brings a state law discrimination claim in federal court in California, the claim will survive, according to the Ninth Circuit. But if the same officer brings the same state law discrimination claim in California state court, the claim will not survive. The California Supreme Court has unanimously held that the NBA preempts California's employment discrimination statute to some degree, *Peatros v. Bank of America NT&SA*, 990 P.2d 539 (Cal. 2000), with a majority of the Court holding that the NBA preempts state law discrimination claims entirely. *Id.* at 563 (Brown, J., dissenting), 559 (Kennard, J., concurring).[2] The majority

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[2] Justice Brown's opinion was fashioned as a dissent because four of the other seven justices, for different reasons, held that summary judgment had been inappropriate, whereas Justice Brown would have upheld summary judgment. For this reason, the opinion by Justice Mosk is labeled the "lead opinion" in California because along with a concurrence by Justice Kennard, it formed the majority to overturn summary judgment. But Justice Brown's views on the scope of preemption represents the law of California, because it garnered four votes.

In her Brief in Opposition, Respondent erroneously asserts that *Peatros* is not precedential law in California because Justice Brown's decision is labeled as a dissent to the holding of the court. (Resp.'s Opp. Br. at 11-12.) Contrary to what she states, however, California courts, including the California Supreme Court, count opinions of justices who dissented in the result but concurred as to a

(footnote continued...)

reasoned that allowing states to impose their own substantive laws would frustrate Congress's vision of uniform federal standards. *Peatros*, 990 P.2d at 563 (Brown, J., dissenting).

An Ohio employment discrimination lawsuit presents the flip side of the same jurisdictional crapshoot. If the state discrimination claim is brought in state court, it will

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point of law to determine whether in any plurality decision there is a majority opinion as to a rule of law. *See, e.g., DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220, 223-24 (Cal. 1981), *cert. denied* 454 U.S. 832 (1981) (following rule of law laid down by four *dissenting* justices and one concurring justice of the U.S. Supreme Court in *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978)). Respondent also refers to several California cases that cite to Justice Mosk's lead opinion for support on issues of law. (Resp.'s Opp. Br. at 12-13 & n.3.) While she is correct that Justice Mosk's opinion is cited as persuasive authority in these cases, in each case the citation is to a rule of law unanimously agreed upon in *Peatros*. For instance, in *Nordyke v. King*, 44 P.3d 133, 138 (Cal. 2002), the California Supreme Court cited to Justice Mosk's opinion for the unremarkable proposition that partial preemption does not wholly invalidate a statute. Every Justice in *Peatros* agreed this was the law; the question in that case was not what effect partial preemption by the NBA would have, but whether NBA preemption was partial at all. Thus, *Nordyke* does not alter the precedential value of Justice Brown's and Justice Kennard's opinion in *Peatros*. Likewise, every other case cited by Respondent relies on Justice Mosk's opinion as properly stating the standard to determine if preemption exists. Again, the proper standard was something agreed upon by all justices in *Peatros*; the plurality resulted in the *application* of the standard to the state statute at issue. Suffice it to say that not one of the cases cited by Respondent follows Justice Mosk's specific opinion on whether the NBA partially preempts the FEHA as precedential. Under California law, Justice Mosk's opinion is not precedential on that particular question.

survive. *See White v. Fed. Reserve Bank*, 660 N.E. 2d at 496. But if the bank can remove it to federal court, the claim will be dismissed. *See Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928, 931 (6th Cir. 1987) (holding that Michigan's employment discrimination statute was preempted by the FRA); *Arrow*, 358 F.3d at 393 (same).

A national bank's susceptibility to a state law discrimination charge, then, can depend not just upon the state, and not just on whether the officer files the lawsuit in state or federal court, but on the fortuity of whether the bank is a citizen of the state in which the lawsuit is filed. The current law assures national banks about as much uniformity and certainty as a game of Russian roulette.

B. Even Courts that Agree that the National Bank Act Preempts State Law Discrimination Claims Are Split on the Scope of Preemption, with the Ninth Circuit Adding to the Confusion.

To say that the courts are split over *whether* the NBA preempts state employment discrimination laws barely scratches the surface of the conflict. Even among jurisdictions that hold that the NBA preempts state employment discrimination laws, the courts are hopelessly split as to the scope of the preemption.

Before the Ninth Circuit weighed in, there were already two conflicting camps. On one side is the view (adopted in California, as well as the Fourth and Sixth Circuits) that the NBA preempts state law completely. *Peatros*, 990 P.2d at 563 (Brown, J., dissenting). Any less robust form of preemption would burden the state courts and administrative agencies with a cumbersome preemption analysis of every procedural advantage or remedial device available. *Id.* at 563. This would be "a high price to pay for a cause of action that merely

duplicates remedies already available under Title VII and ADEA." *Id.*; *see Fasano v. Fed. Reserve Bank of New York*, No. 05-4661 (3d Cir. Aug. 3, 2006) (holding that FRA preempts state law provisions completely unless state statutes are exactly the same as federal counterparts) (approving *Evans v. Fed. Reserve Bank of Philadelphia*, No. Civ.A.03-4975, 2004 WL 1535772, at *6 (E.D. Pa. 2004) (endorsing "practical" preemption, but when a state statute has any provisions that expand either the rights *or remedies* permitted by federal law, the statute conflicts with federal law and must be preempted in its entirety; courts, particularly federal courts, should not be rewriting state statutes)).

On the other side is the view that the NBA preempts state employment discrimination statutes, but only "partially"—only to the extent that the remedial provisions are in synch. *Peatros*, 990 P.2d at 553 (Mosk, J.). Thus, by this view, state law claims for age and race discrimination should not be dismissed entirely because federal law, too, prohibits age and race discrimination. *Id.* at 552. But the remedies available under state law cannot exceed the federal remedies. *Id.* Thus, for example, the minority faction of the California Supreme Court held that federal law, which caps damages, preempts the state statute to the extent that it allows unlimited compensatory and punitive damages. *Id.*

Into this fray entered the Ninth Circuit with what appears to be yet a third approach. At first blush, the Ninth Circuit appears to hold that the NBA does not preempt the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400, at all, simply because both the WLAD and the ADEA prohibit termination of employees for being 40 or over. *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 988-89 (9th Cir. 2005),

as amended on denial of reh'g (Feb. 13, 2006). On closer inspection, however, it becomes apparent that the holding is more limited. Recognizing "Congress's intent to create a national banking system with 'uniform and universal operation through the entire territorial limits of the country,'" the Ninth Circuit hinted that it would preempt "state law prohibitions against discriminatory terminations that are *not* consistent with federal anti-discrimination laws." *Id.* at 989 (emphasis added) (quoting *Talbott v. Bd. of Com'rs of Silver Bow County,* 139 U.S. 438 (1891)). The key for the Ninth Circuit is whether the state statute "substantively mirrors a claim under the ADEA" or another federal anti-discrimination statute. *Id.* at 989.

The court does not explain what it means for a state claim to "substantively mirror" a federal one. Is it, as the quoted language suggests, only when the *grounds* for termination enumerated in the state statute are the same as those covered by federal law? In that case, perhaps an age discrimination claim would be preempted only when the comparable federal law provides no redress—as would be the case, for example, if state law would allow a 38-year-old to sue for age discrimination, contrary to the federal law that requires the employee to be 40 years old. Or does a state law "substantively mirror" federal law only to the extent that the remedies and procedures are the same? *Cf. Fasano v. Fed. Reserve Bank of New York*, No. 05-4661 (3d Cir. Aug. 3, 2006) (holding that state statutes that differ in remedies are preempted by FRA even when substantive protected categories may be the same). In that case, as we shall see, many attributes of the WLAD remedy would fail the test.

Whatever the answer in the Ninth Circuit, there is no disputing that even the courts that agree that the NBA

preempts state employment discrimination laws do not speak with one voice as to the scope of the preemption. And, again, the disagreements are unlikely to resolve themselves until this Court intervenes.

II. THE ISSUE IS IMPORTANT BECAUSE SUBSTANTIAL DIFFERENCES BETWEEN STATE AND FEDERAL EMPLOYMENT DISCRIMINATION STATUTES ABOUND, FRUSTRATING CONGRESS'S DESIRE FOR UNIFORM FEDERAL STANDARDS.

The conflicts among the lower courts have practical ramifications precisely because the differences between state and federal employment discrimination laws can be so substantial. We briefly review the types of differences that abound, and then explore how those differences affect the national banks.

A. State Employment Discrimination Law Differs from Federal Law in Numerous Ways.

Differences in Protected Categories. Several states extend discrimination law well beyond the reach of federal law. For example, unlike federal law, 21 states (including both Washington and California) prohibit termination because of marital status, and 16 (again including both Washington and California) prohibit discrimination on the basis of sexual orientation. Other states variously prohibit discrimination on the basis of familial status, Or. Rev. Stat. § 659A.309; Pa. Stat. Ann. tit. 43, § 953; place of birth, Vt. Stat. Ann. tit. 21 § 495; criminal record, 775 Ill. Comp. Stat. 5/7-103; Wis. Stat. § 111.321; public assistance, Minn. Stat. § 363A.08; N.D. Cent. Code, § 14-02.4-03; and political affiliation, D.C. Code § 2-1402.11. The District of Columbia goes

further, prohibiting termination based on personal appearance or, indeed, "any reason other than that of individual merit." D.C. Code § 2-1401.01.

Even within the categories otherwise protected by federal law, state and federal law differ in significant ways. For example, under the ADEA, only an employee who is 40 or older can claim age discrimination. Numerous states expand this category, either by allowing a plaintiff of any age to claim age discrimination or by allowing anyone from age 18 and up to do so (five states and D.C.).

Likewise, the federal Americans With Disabilities Act protects persons with disabilities from discrimination. Under this federal law, to be disabled, a plaintiff must prove he or she suffers from a condition that "substantially limits" a "major life activity." 42 U.S.C. § 12102(2)(A); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999). Several states including California and Connecticut have enacted far broader definitions of who is "disabled" under state law, thereby increasing protections to persons not covered under federal law. Cal. Gov't Code § 12926.1(c); Conn. Gen. Stat. § 46a-60(a).

Differences in What Employers Are Covered. There are also differences in what employers are covered. Title VII applies only to employers of 15 or more employees; the ADEA applies only to employers of 20 or more. In contrast, 35 states and the District of Columbia apply their laws to employers of fewer than 15 employees.

Remedial Differences. Various states also offer remedial schemes that differ substantially from federal law. Title VII and other federal laws place strict limits on the nature and amount of compensatory and punitive

damages, including emotional distress damages, capping them at $300,000. 42 U.S.C. § 1981a(b)(3). The ADEA does not even allow for emotional distress damages, and replaces punitive damages with double the amount of economic damages if the plaintiff establishes willful misconduct. 29 U.S.C. § 626(b). In contrast, most states, including both Washington and California, allow limitless awards for emotional distress or punitive damages and have no double damages provisions. *See, e.g.,* Wash. Rev. Code § 49.60.030(f)(2); *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 1*, 87 P.3d 757, 759, 762-63 (Wash. 2004) (WLAD provides for all actual damages incurred); *Commodore Home Sys., Inc. v. Superior Ct.*, 649 P.2d 912, 918 (Cal. 1982) (unlimited compensatory and punitive damages available under California law).

Different Defenses. The defenses available under federal statutes are not always available under state law. To take one example that seems especially salient in this case, federal law allows an employer to invoke a "mixed motive" defense, *see, e.g., Rachid v. Jack In the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004), which is unavailable under the WLAD, *see McKay v. Acorn Custom Cabinetry, Inc.*, 898 P.2d 284, 293-94 (Wash. 1995) (Madsen, J., dissenting) (noting WLAD does not recognize mixed motive cases). This defense applies to an employer who has taken a protected characteristic into account in its termination decision. The defense, if it applies, absolves the employer of liability if the employer establishes it would have made the same decision without regard to the impermissible consideration. *Desert Palace, Inc. v. Contra Costa*, 539 U.S. 90, 99 (2003).

Procedural Differences. There are also vast procedural differences between the federal and state

systems. For instance, many federal statutes, including Title VII, require administrative exhaustion before the employee files a suit. 42 U.S.C. § 2000e-5(f)(1). The reason for administrative exhaustion is that Congress has determined that a federal agency, the EEOC, has specialized ability to investigate and root out invidious practices. Five states, including Washington, do not require such exhaustion for claims. 12 states, including California, imbue the state agencies with more authority than Congress has given the EEOC, such as permitting them to award relief calculated to deter future violations, including attorneys fees' and costs, *e.g.*, Alaska Stat. § 18.80.130, or administrative fines, *e.g.*, N.H. Rev. Stat. Ann. § 354-A:21.

The statutes of limitations also vary between federal and state law. Title VII requires a plaintiff to file an administrative charge of discrimination within 180 days of the alleged misconduct and, after receiving a "right to sue" notice, the plaintiff has 90 days to file a civil complaint.[3] 42 U.S.C. §§ 2000e-5(c), 2000e-5(e)(1), 2000e-5(f)(1). The ADEA provides a two year statute of limitations for non-willful violations. In contrast, 15 states, including Washington and California, expand the deadlines to file administrative charges longer than 180 days and give employees more time to file civil actions. Cal. Gov't Code §§ 12960(b), 12965(d) (in California, employees have a year after a right to sue issues to file a civil complaint); Wash. Admin. Code § 162-08-071(5);

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[3] This 180 days to file an initial charge is expanded to 300 days if a state does not have a deferral agency. 42 U.S.C. § 2000e-5(e)(1). Currently, all but four states have deferral agencies.

Martini v. Boeing Co., 945 P.2d 248 (Wash. App. 1997), *aff'd* 971 P.2d 45 (Wash. 1999) (three year statute of limitations applies to actions under WLAD).

Moreover, states differ from federal law as to what act begins the running of the statute of limitations. Under federal law, notice of a pending termination is sufficient to begin the time period to file suit. California, by contrast, does not start the clock until the actual employment action takes place. *Romano v. Rockwell Int'l, Inc.*, 926 P.2d 1114, 1127 (Cal. 1996).

Differences in Individual Liability. Finally, federal law and state law may differ in terms of the liability borne by individual managers who make termination decisions. Title VII and the other federal laws do not permit individual liability for termination decisions. *See Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied by Miller v. La Rosa*, 510 U.S. 1109 (1994), *reh'g denied* 511 U.S. 1048 (1994). In contrast, at least four states, including Washington and California, authorize individual liability, thus subjecting bank managers to liability for their decisions to terminate bank officers. *See Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 926 (Wash. 2001); *Walrath v. Sprinkel*, 121 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002) (supervisors personally liable for retaliation under California statute); *Winarto v. Toshiba Am. Elecs. Components*, Inc., 274 F.3d 1276, 1288 (9th Cir. 2001) (same).[4]

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[4] *See also Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562 (D.R.I. 1996); *St. Peter v. Ampack-Division of Gatewood Prods., Inc.*, 484 S.E.2d 481 (W. Va. 1997); *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999).

B. The Numerous Distinctions, and the Uncertainty Surrounding Preemption, Undermine Congress's Goals.

Congress wanted national banks to be subject to uniform federal standards not for aesthetic reasons, but for practical ones. To ensure public trust in nationally chartered banks, national banks had to have the latitude to make quick, decisive employment decisions, and to make these decisions consistently regardless of where the particular officer happens to sit.

When national banks are subject to competing or unclear standards, this goal cannot be achieved. Employers do not decide whether to terminate an officer in a vacuum. Even armed with a strong business justification for the termination, a prudent employer evaluates whether the decision carries with it the danger of a lawsuit, what the potential liability could be, and what procedural advantages and disadvantages it will face in eventual litigation. Differences in substantive rights, remedies, and procedures affect the calculus profoundly, as does uncertainty as to which body of law governs the decision and any dispute that follows in its wake.

For example, a national bank deciding whether to fire a poor-performing officer for perfectly valid business reasons might reach different conclusions depending upon whether the officer could avail himself of a cause of action under state law that would not exist under federal law. Similarly, a bank manager may respond differently to a bank officer's misconduct depending upon whether the manager faces personal liability for a termination.

In each situation, the bank's response might be precisely the opposite of what Congress intended under

Section 24(Fifth), erring on the side of retaining the officer, rather than exercising the power granted by Congress to take appropriate employment action.

The calculus is equally affected by the damages differential. A bank deciding whether to fire an officer of questionable ethics might well reach different conclusions depending upon whether the termination could expose the bank to limitless punitive damages. The institutional response, again, could be to be to retain officers rather than—as Congress intended—"immediate removal whenever the suspicion of faithlessness or negligence attaches to" an officer. *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896).

In short, a national bank's response to the same exact situation will differ significantly based solely on where the bank officer is located. That is exactly the opposite result intended by Congress. The Ninth Circuit's decision confuses and confounds these issues. The open question of NBA preemption thus has practical effects warranting review by this Court.

CONCLUSION

This Court should grant the Petition for Writ of *Certiorari*.

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